

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Steve Sviggum, Chairman, House
Republican Campaign Committee,
Complainant,

vs.

FINDINGS OF FACT,
CONCLUSIONS, AND
ORDER

Minnesota DFL Party, Mike Erlandson,
Chairman
Respondent.

The above-entitled matter came on for an evidentiary hearing on November 22, 2004, before a panel of three Administrative Law Judges: Kathleen D. Sheehy (Presiding Judge), Steve M. Mihalchick, and James F. Cannon.^[1] The hearing record closed on November 22, 2004, at the close of the hearing.

Paul Kohls, Rider Bennett LLP, 333 South 7th Street, Suite 2000, Minneapolis, MN 55402, appeared for the Complainant.

Jay Benanav, Weinblatt & Gaylord PLC, 111 East Kellogg Boulevard, Suite 300, St. Paul, MN 55101, appeared for the Respondent.

NOTICE

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF ISSUES

Did the Minnesota DFL Party violate Minn. Stat. § 211B.02 by preparing campaign material for two candidates that contained a false claim of endorsement by the Minnesota Farm Bureau?

The panel concludes that the Respondent violated Minn. Stat. § 211B.02 by knowingly making a false claim of endorsement of an organization. A fine in the amount of \$800 is imposed (\$400 per violation).

Based upon the entire record, the panel makes the following:

FINDINGS OF FACT

1. The Minnesota DFL Party hired a direct mail consultant called Winning Direction to prepare campaign literature for six DFL candidates running for the Minnesota House of Representatives. The Minnesota DFL Party added these six races to its list of races that would be supported with mailings shortly before the election.^[2]

2. Winning Direction prepared a template for the mailing and prepared the text for each candidate based on a biography prepared by the Minnesota DFL. The biographies for each candidate included their endorsements by various organizations. All six candidates were endorsed by the Minnesota Farmers Union.^[3]

3. When draft versions of the mailing were sent to the Minnesota DFL for review prior to printing, the mailings for two of the six candidates incorrectly provided that the Minnesota Farm Bureau had endorsed those candidates.^[4] The two candidates were Lyle Koenen, the incumbent in District 20B, and Richard Peterson, who was running for an open seat in District 22B. The drafts for the four other candidates correctly provided that the Minnesota Farmers Union had endorsed them.^[5]

4. The person or persons assigned to proofread the drafts did not notice the error in the name of the endorsing organization on the mailings pertaining to these two candidates. On or about October 20, 2004, the drafts were approved. They were printed and delivered for mailing by October 24 or 25, 2004.^[6]

5. The mailings cost approximately \$1 per piece including postage. Approximately 7,500 pieces were mailed to people within each of the two legislative districts. The total cost of the two mailings containing the incorrect endorsement was about \$15,000.^[7]

6. The Minnesota Farm Bureau generally does not endorse any candidates for political office and specifically did not endorse these candidates. The Farm Bureau has a scoring system by which it tracks legislative votes, and the Farm Bureau uses those scores to determine whether a legislator qualifies as a "Friend of Agriculture." Rep. Koenen did not receive the "Friend of Agriculture" designation based on votes cast in 2003-04.^[8]

7. In the political realm, the Minnesota Farm Bureau is known to be a more conservative organization than the Minnesota Farmers Union. The campaign manager for the Minnesota DFL was aware, and any staff person working on the project should reasonably have been aware, of the difference between the two organizations.^[9]

8. On October 27, 2004, a Farm Bureau member from Rep. Koenen's district contacted the DFL to clarify that the Farm Bureau does not endorse candidates for political office. At that time, the campaign manager for the DFL reviewed the six mailings and noticed the endorsement error in the two pieces. He contacted the Farm Bureau to notify the bureau of the mistake involving Rep. Peterson.^[10]

9. Later that evening, the DFL faxed a correction to local newspapers in Districts 20B and 22B.^[11] With one exception, all of the newspapers receiving the correction notice are published weekly.^[12] The DFL also prepared a postcard

correction notice that was mailed to each person who received a copy of the mailings containing the incorrect endorsement. The postcards were prepared October 28, 2004, and printed during the weekend of October 30-31, 2004. They were mailed, at the earliest, on November 1, 2004. It typically takes between one and three days for first-class mail to be delivered to these districts.^[13] The postcard correction notices were prepared and mailed at a cost of about \$3,000.

10. The general election was held on November 2, 2004.

Based upon the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the Administrative Law Judges to consider this matter.

2. Minn. Stat. § 211B.02 provides in relevant part that a person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate has the support or endorsement of a major political party or party unit or of an organization.

3. The burden of proving the allegations in the Complaint is on the Complainant.^[14]

4. The Complainant has shown by a preponderance of the evidence that the Minnesota DFL Party violated Minn. Stat. § 211B.02 by knowingly making a false claim of endorsement by the Minnesota Farm Bureau on behalf of two candidates for the Minnesota House of Representatives.

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel makes the following:

ORDER

IT IS HEREBY ORDERED: That the Minnesota DFL Party is assessed a civil penalty of \$800.

Dated this 24th day of November 2004.

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

/s/ James F. Cannon

JAMES F. CANNON

Workers' Compensation Judge

MEMORANDUM

The parties do not dispute that the mailings containing the Farm Bureau endorsements constituted a false claim of endorsement by an organization. The dispute here is whether the Minnesota DFL Party knowingly made such a claim, in violation of Minn. Stat. § 211B.02. The Minnesota DFL argues that this was an inadvertent human error and that no violation occurred because the error was not knowingly made.

The statute provides in relevant part that a person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate has the support or endorsement of a major political party or party unit or of an organization. For a violation to be established, the complainant must show a knowingly false claim of endorsement. The panel has little difficulty in concluding that the Minnesota DFL Party collectively knew that the Farmers Union, not the Farm Bureau, had endorsed these two candidates. This knowledge is sufficient to establish a violation. The fact that the proofreader (whoever it may have been) did not notice the error does not negate the violation but is relevant, instead, in determining the amount of the appropriate penalty.

The panel concludes that this was an inadvertent and isolated but nonetheless negligent error. Because the mailing was distributed just a few days before the election, there was no way to easily counter it. The Minnesota DFL party argues that it did what it could in the crush of work before the election and that no more could be expected. The panel believes that if political parties are going to send out mailings so close to the election, then extra care, not less, should be taken to ensure their accuracy. The panel finds that a civil penalty of \$400 for each of the incorrect mailings, or \$800 total, is appropriate.

Both parties have cited to the recent decision in *Bauman v. House Republican Campaign Committee*, OAH Docket No. 7-0320-16264-CV (Nov. 19, 2004). *Bauman* arose under Minn. Stat. § 211B.06, subd. 1, which prohibits the intentional participation in the preparation or dissemination of campaign material "that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false." This is a different, and higher, standard than that contained in § 211B.02. Nonetheless, we view the case as analogous in the sense that it involved a similar error of negligence in the preparation of campaign material that allowed an undisputedly false statement to be distributed just before the election. A similar conclusion has accordingly been reached.

K.D.S., S.M.M., J.F.C.

^[1] Judge Cannon is a workers' compensation judge, who was appointed to this panel pursuant to Minn. Stat. § 14.48, subd. 3(c).

^[2] Testimony of John Van Hecke.

^[3] *Id.*; Ex. 8.

^[4] Testimony of John Van Hecke.

^[5] *Id.*

^[6] *Id.*; Ex. 1.

^[7] Testimony of John Van Hecke.

^[8] Complaint Form, Exs. B & C.

^[9] Testimony of John Van Hecke.

^[10] *Id.*

^[11] Exs. 2-5.

^[12] The *Worthington Daily Globe* is published each day.

^[13] Testimony of John Van Hecke.

^[14] Minn. Stat. § 211B.32, subd. 4.